United Nations CTOC/COP/WG.2/2014/1

Conference of the Parties to the United Nations Convention against Transnational Organized Crime

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Working Group of Government Experts on Technical Assistance
Vienna, 6-7 October 2014

Annotated provisional agenda

Provisional agenda

1. Organizational matters:
   (a) Opening of the meeting;
   (b) Adoption of the agenda and organization of work.
2. Criminalization of participation in an organized criminal group.
3. Liability of legal persons.
4. Information-gathering under article 32, paragraph 5, of the United Nations Convention against Transnational Organized Crime.
5. Other matters.
6. Adoption of the report.

Annotations

1. Organizational matters

(a) Opening of the meeting

The eighth meeting of the Working Group of Government Experts on Technical Assistance will be opened on Monday, 6 October 2014, at 3 p.m.

(b) Adoption of the agenda and organization of work

At its meeting on 4 April 2014, the extended Bureau of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime agreed on the provisional agenda for the eighth meeting of the Working Group of Government Experts on Technical Assistance. The provisional agenda was prepared

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on the basis of the recommendations made by the Working Group at its seventh meeting, held in Vienna from 28 to 30 October 2013.

2. Criminalization of participation in an organized criminal group

In the report on its seventh meeting (CTOC/COP/WG.2/2013/5), the Working Group recommended that the United Nations Office on Drugs and Crime (UNODC) should expand the knowledge base on legislative and administrative measures to combat transnational organized crime, including by preparing, subject to the availability of extrabudgetary resources, issue papers on provisions of the United Nations Convention against Transnational Organized Crime.

Recent information-gathering efforts as part of the development of the knowledge management portal known as Sharing Electronic Resources and Laws against Organized Crime (SHERLOC) have revealed that many States parties have faced difficulties in implementing article 5 (Criminalization of participation in an organized criminal group) of the Organized Crime Convention.

For its consideration of this item, the Working Group will have before it a background paper on criminalization of participation in an organized criminal group.

The Secretariat will present to the Working Group an overview of legislation on article 5 included in the SHERLOC knowledge management portal.

Documentation

Background paper by the Secretariat on criminalization of participation in an organized criminal group (CTOC/COP/WG.2/2014/2)

3. Liability of legal persons

In the report on its seventh meeting (CTOC/COP/WG.2/2013/5), the Working Group recommended that UNODC should, subject to the availability of extrabudgetary resources, assist States by preparing an issue paper on the criminal, civil or administrative liability of legal persons. Recent information-gathering efforts have shown that, in general, two models of liability of legal persons have emerged. For its consideration of this item, the Working Group will have before it a background paper on liability of legal persons (article 10 of the Organized Crime Convention).

The Secretariat will present to the Working Group an overview of legislation on article 10 included in the SHERLOC knowledge management portal.

Documentation

Background paper by the Secretariat on liability of legal persons (CTOC/COP/WG.2/2014/3)

4. Information-gathering under article 32, paragraph 5, of the United Nations Convention against Transnational Organized Crime

In accordance with article 32, paragraph 5, of the Organized Crime Convention, each State Party should provide the Conference of the Parties with information on its programmes, plans and practices, as well as legislative and administrative

measures to implement the Convention, as required by the Conference of the Parties.

At its meeting held on 11 February 2014, the extended Bureau of the Conference of the Parties to the Convention requested that the Secretariat prepare a background paper on the issue of reporting obligations to be considered during the seventh session of the Conference. At its meeting held on 4 April 2014, the extended Bureau of the Conference agreed that the issue would be discussed in the framework of the Working Group of Government Experts in Technical Assistance, taking into consideration that technical assistance needs are best identified through information provided from States parties.

For its consideration of this item, the Working Group will have before it a conference room paper on information-gathering under article 32, paragraph 5, of the Convention and conference room papers containing needs assessment tools relating to various provisions of the Convention.

The Secretariat will present to the Working Group options on information-gathering and knowledge management.

Documentation

Conference room paper on information-gathering under article 32, paragraph 5, of the United Nations Convention against Transnational Organized Crime (CTOC/COP/WG.2/2014/CRP.1)

Needs assessment tool on liability of legal persons and jurisdiction (CTOC/COP/WG.2/2014/CRP.2)

Needs assessment tool on law enforcement, prosecution, adjudication and sanctions (CTOC/COP/WG.2/2014/CRP.3)

Needs assessment tool on international law enforcement and judicial cooperation (CTOC/COP/WG.2/2014/CRP.4)

Needs assessment tool on training and research on and the prevention of organized crime (CTOC/COP/WG.2/2014/CRP.5)

5. Other matters

As no issues to be raised under item 5 have come to the attention of the Secretariat, no documentation regarding this item is currently foreseen.

6. Adoption of the report

The Working Group will adopt a report on its meeting, the draft of which will be prepared by the Secretariat.

Annex

Proposed organization of work

Date and time	*Agenda item*	*Title or description*
Monday, 6 October		
3-6 p.m.	1 (a)	Opening of the meeting
	1 (b)	Adoption of the agenda and organization of work
	2	Criminalization of participation in an organized criminal group
	3	Liability of legal persons
Tuesday, 7 October		
10 a.m.-1 p.m.	3	Liability of legal persons (*continued*)
3-6 p.m.	4	Information-gathering under article 32, paragraph 5, of the Organized Crime Convention
	5	Other matters
	6	Adoption of the report

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Conference of the Parties to the United Nations Convention against Transnational Organized Crime

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Working Group of Government Experts on Technical Assistance
Eighth session
Vienna, 6-7 October 2014
Item 2 of the provisional agenda*
Criminalization of participation in an organized criminal group

Criminalization of participation in an organized criminal group (article 5 of the United Nations Convention against Transnational Organized Crime)

Background paper by the Secretariat

I. Introduction

1. At its meeting held in Vienna from 28 to 30 October 2013, the Working Group of Government Experts on Technical Assistance recommended, inter alia, that the United Nations Office on Drugs and Crime (UNODC) should expand the knowledge base on legislative and administrative measures to combat transnational organized crime, including by preparing issue papers on provisions of the United Nations Convention against Transnational Organized Crime.[1] The present paper is prepared in furtherance of that recommendation and also integrates the responses by States to the omnibus self-assessment checklist on the Organized Crime Convention.[2]

2. The purpose of the Organized Crime Convention, as stated in its article 1, is to promote cooperation to prevent and combat transnational organized crime more effectively. The Convention seeks to encourage countries that do not yet have provisions against organized crime to adopt comprehensive countermeasures and to provide guidance for States in approaching the legislative and enforcement

* CTOC/COP/WG.2/2014/1.

[1] United Nations, *Treaty Series*, vols. 2225, 2237, 2241 and 2326, No. 39574.

[2] In March 2013, a note verbale was circulated to all Member States, inviting them to transmit to the Secretariat the completed omnibus self-assessment checklist. By 12 May 2014, seven responses (from Armenia, Bahrain, Lebanon, Mexico, the Republic of Korea, the Russian Federation and Ukraine) had been received.

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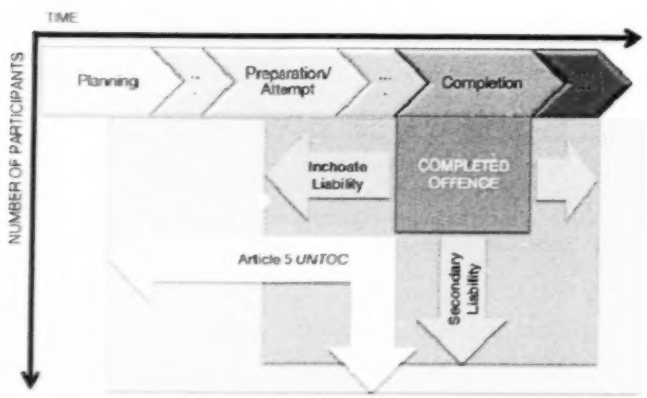
questions related to countering transnational organized crime. The Convention also seeks to eliminate safe havens for organized criminal groups by promoting greater standardization and coordination of national legislative, administrative and enforcement measures in order to ensure a more efficient and effective global effort to prevent and suppress transnational organized crime.

3. An important means for achieving these goals is the criminalization of participation in an organized criminal group, pursuant to article 5 of the Convention. The present background paper provides an overview of the purpose, content and scope of that provision. After an analysis of the different aspects of article 5, the paper also highlights a number of issues and challenges related to its implementation.

II. Purpose, content and scope of article 5

4. The main purpose of article 5 of the Organized Crime Convention, to be implemented by all States parties, is to establish an offence that creates criminal liability for persons who intentionally participate in or contribute to the criminal activities of organized criminal groups. The offence is aimed at tackling organized crime at its core by criminalizing acts that involve participation in or contributions to an organized criminal group. Article 5, paragraph 1 (a), is designed to be preventive, by creating liability "distinct from the attempt or completion of the criminal activity" and holding criminally liable those who associate for criminal endeavours, even if they have not yet committed an offence. Article 5 thus broadens the spectrum of criminal liability beyond the established parameters of inchoate and secondary liability, that is, liability that arises before and without completion of the criminal offence and liability for multiple persons acting together (see figure below). Article 5 extends criminal liability to situations in which crime is anticipated and likely to occur, but a specific offence has yet to materialize, and it applies to groups of persons acting in concert to commit serious crime.

Figure
Spectrum of criminal liability



5. Another purpose of article 5 is to extend criminal liability for different ways in which a person may participate in the commission of a serious crime involving an organized criminal group, including as organizers, directors, founders, financiers, participants or supporters. Importantly, States parties that implement article 5, paragraph 1 (b), are able to hold accountable those who plan, mastermind, organize, direct or actively support the criminal activities of an organized criminal group but who themselves do not commit, or have not yet committed, a specific criminal offence.

6. Article 5 serves to reduce the risk that criminal offences will be committed, thus minimizing the potential for harm to occur, and seeks to criminalize conduct that has the potential to culminate in harm or damage, as well as to enhance law enforcement, prosecution and adjudication and to enable criminal justice agencies to intervene earlier without having to wait until harm or damage is done.

A. Definitions

7. The offences set out in article 5, paragraph 1, of the Convention build on the definition of the term "organized criminal group", which is used throughout the Convention. Article 2, paragraph (a), of the Convention defines an "organized criminal group" as a "structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit".

8. This definition combines elements relating to the structure of the group with those relating to the objectives of the group. The definition does not require proof of any actual criminal activities having been carried out by the organized criminal group (see table 1 below).

Table 1
"Organized criminal group", as defined in article 2 (a) of the Convention

Terminology	*Elements*
Structure	Structured group[a]
	Three or more persons
	Existing for a period of time and acting in concert
Activities	No elements defined
Objectives	To commit serious crimes[b] or offences established in accordance with the Convention
	To obtain a financial or material benefit

[a] As defined in article 2, paragraph (c), of the Convention.
[b] As defined in article 2, paragraph (b), of the Convention.

9. The structural requirements of this definition involve a "structured group of three or more persons, existing for a period of time and acting in concert". The term "structured group" is further defined in article 2, paragraph (c), to mean "a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its

membership or a developed structure". The term "acting in concert" also suggests that there is some connection and coordination between persons involved in the group and that they are not operating in isolation.

10. The objective of the organized criminal group is to commit "one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit". Article 2, paragraph (b), of the Convention defines the term "serious crime" to mean "conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty". The definition is thus both connected and limited to groups intending to commit offences that attract a very substantial penalty under domestic law. The offences which qualify as "serious offences" are left to States parties to determine.

B. Scope and application

11. According to article 3, paragraph 1, the Convention applies "to the prevention, investigation and prosecution" of Convention offences, including offences under article 5, and to serious crime "where the offence is transnational in nature and involves an organized criminal group".

12. Article 3, paragraph 2, limits the application of the offences under article 5 to "transnational" organized crime, i.e. to offences that occur across international borders. The Convention thus applies and can be used as a basis for international cooperation when the offence is transnational. Article 34 of the Convention further stresses that the criminalization of participation in an organized criminal group in domestic laws shall not require the conduct to be transnational in nature, so that the offences implemented pursuant to article 5 are to exist and apply in situations that do not involve a cross-border component.

13. As an international treaty that needs to be adaptable to the systems, traditions and needs of individual States parties, the Convention does not determine set penalties for the offences under article 5. To offer guidance and ensure that States parties adequately recognize the seriousness of organized crime, article 11, paragraph 1, indicates that penalties for a Convention offence should take into account the gravity of the offence. Article 26, paragraphs 2 and 3, encourages States parties to consider mitigating the sentence or granting immunity from prosecution to persons who cooperate with the authorities in the investigation or prosecution of organized crime.

III. Offences related to participation in an organized criminal group

14. Article 5, paragraph 1 (a), of the Convention offers States parties a choice between two offences that criminalize involvement in an organized criminal group:

(a) An offence that is based on an agreement to commit crime;

(b) An offence for participating in the activities of an organized criminal group.

15. These two alternatives reflect the different traditions and developments in civil- and common-law jurisdictions and allow States parties to choose the offences best suited to their domestic legal systems.[3] The offence contained in article 5, paragraph 1 (a)(i), builds on the conspiracy offences that are recognized across most common-law jurisdictions. The participation offence under subparagraph (ii), sometimes referred to by its French name, *association des malfaiteurs*, may be more suitable for civil-law countries, many of which do not permit the criminalization of mere planning and agreement without any physical activity in furtherance of the agreement.[4]

16. The scope and application of the two offences are not completely identical. It is for this reason that the Convention does not set them out as mutually exclusive alternatives. Instead, States parties may adopt either or both types, and several jurisdictions have indeed implemented both models concurrently. While the adoption of both models adds flexibility and provides a greater scope of criminalization, it may also create considerable overlap and result in confusion for those enforcing and applying the two offences.

A. Article 5, paragraph 1 (a)(i): the agreement model

17. Liability for the offence in article 5, paragraph 1 (a)(i), of the Convention is based on an agreement to commit serious crime. The design of this offence is, for the most part, identical with conspiracy offences found in most common-law jurisdictions, where the concept of conspiracy can be traced back to the early seventeenth century. However, the Convention does not use the term "conspiracy".

18. Put simply, the conspiracy offence criminalizes agreements between two or more persons to commit an unlawful act where there is an intention to commit that unlawful act. The rationale of conspiracy is based on the view that, if one person agrees with another about the commission of a crime, this increases the likelihood that a crime will be committed and that further crimes may follow. In many jurisdictions, especially those following common-law traditions, the doctrine of conspiracy is a tool for creating liability for persons involved in organized criminal groups, especially those who plan or organize the criminal activities and delegate their execution.

19. One purpose of the conspiracy offence is to extend liability "backwards" by criminalizing the planning (or agreement) stage of a criminal offence (see figure following para. 4 above). Conspiracy creates criminal liability even if no preparation of the contemplated offence has begun. The offence thus serves to prevent crime and allows criminal justice agencies to intervene (and enables charges to be laid) some time before an offence is actually attempted or completed.

20. The criminalization of conspiracy has a further purpose in that it allows for prosecution of multiple persons involved in a criminal enterprise. The offence

[3] See footnote 12 of the draft of the Convention dated 12 December 1998 (A/AC.254/4).

[4] *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations, New York, 2004), para. 49.

attaches liability to agreements to commit crime, which enables the prosecution of persons who organize and plan crime but do not themselves execute those plans.

21. The elements of the offence under article 5, paragraph 1 (a)(i), combine the agreement to commit a crime with the purpose of obtaining a financial or other benefit. In essence, liability under article 5, paragraph 1 (a)(i), arises when two or more persons deliberately enter into an agreement to commit a serious crime for the purpose of obtaining some material benefit. Unlike liability for attempt in the common-law tradition, there is no requirement to demonstrate that the accused came close ("proximate") to the completion of the substantive offence (or "serious crime").

22. For criminal liability to arise, the material or physical elements (actus reus) of article 5, paragraph 1 (a)(i), require proof of the following:

(a) An agreement to commit a serious crime (as defined in article 2, paragraph (b));

(b) That the agreement was between two or more persons (that is, the offender with at least one other person);

(c) Where required by domestic law, an overt act in furtherance of the agreement.

23. The mental or fault elements (mens rea) under article 5, paragraph 1 (a)(i), require proof that:

(a) The purpose of the agreement or the crime committed was to obtain a financial or other material benefit;

(b) The intention of the accused was to enter into the agreement (see article 5, paragraph 1, chapeau).

See table II below.

Table II
Elements of article 5, paragraph 1 (a)(i)

Type of element	*Element*
Physical/material elements (actus reus)	Agreement to commit a serious crime
	Agreement between two or more person(s)
	Where required, an overt act in furtherance of the agreement
Mental/fault elements (mens rea)	Intention to enter into the agreement
	Purpose of obtaining a financial or other material benefit

24. The offence under article 5, paragraph 1 (a)(i), centres predominantly on the agreement to commit a serious crime as defined in article 2 of the Convention. The agreement must be made between at least two persons; an agreement with oneself is not possible. Jurisprudence suggests that, while the agreement cannot exist without communication between the conspirators, there is no requirement that the parties to the agreement know each other. All that is required is that each conspirator is

committed to the agreed objective(s).[5] There is no requirement regarding the level of involvement of a conspirator in the agreement. The agreement may envisage that all conspirators equally take some action towards the agreed goal, but a conspirator may also be part of the agreement without carrying out any action aimed at achieving the common objective.

25. The agreement between the conspirators imports an intention that the unlawful act or purpose of the agreement be executed. To prove the existence of a conspiracy, it must be shown that the conspirators were acting in pursuit of a criminal purpose held in common between them. This requirement is reflected in the chapeau of article 5, paragraph 1, which expressly states "when committed intentionally".

26. The Convention makes an important addition to the general common-law concept of conspiracy by requiring that the purpose of the agreement between the conspirators be to obtain a financial or material benefit. This element is reflective of the overall objective of the Convention and one of the main characteristics of organized crime, which is to achieve material gain from criminal activity. The effect of this added requirement is that it eliminates from article 5, paragraph 1 (a)(i), those conspiracies which are aimed at committing non-profitable crimes. Material benefits are interpreted quite broadly, however, and may also include non-financial advantages such as sexual gratification.[6]

27. Jurisdictions are divided over the requirement to prove some overt physical manifestation that is to take place after the agreement. Some jurisdictions add the "overt act" element to the offence to ensure that it covers instances in which the conspirators actually put their plans into action, so that agreements that are no more than bare intent or wishful thinking do not fall within the spectrum of criminal liability.[7]

28. Article 5, paragraph 3, of the Convention accommodates those jurisdictions which require proof of an overt act in furtherance of the agreement under their domestic law. The experience of those countries which have adopted the "conspiracy model" set out in article 5, paragraph 1 (a)(i), has shown that most conspiracy charges are based on evidence of an overt act, even if this is not a formal requirement. In practice, it is difficult to prove the existence of an agreement if no physical manifestation of the agreement has occurred, and law enforcement agencies generally may not become aware of a conspiracy until a positive act follows the agreement.

29. Article 5, paragraph 2, recognizes that in many legal systems it is permissible to use circumstantial evidence to establish the elements of criminal offences. This applies in particular to not only the mental elements but also to the agreement itself. Accordingly, the purpose, intention or agreement elements

[5] See also Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law*, 3rd ed. (Thomson Reuters, 2010), pp. 416-424.

[6] *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, para. 59.

[7] For example, most jurisdictions in Australia and the United States of America require that at least one of the parties to the agreement commit an overt act pursuant to the agreement. In contrast, in Canada and New Zealand, under English common law, the overt act is not a formal requirement of conspiracy. In these jurisdictions, liability for conspiracy may also arise without any physical manifestation of the agreement between the conspirators.

of article 5, paragraph 1 (a)(i), may be inferred from objective factual circumstances, thus lowering the threshold of the burden of proof placed on the prosecution.

B. Article 5, paragraph 1 (a)(ii): the participation model

30. Subparagraph (ii) of article 5, paragraph 1 (a), of the Convention offers a second, distinct type of offence that is based on the *association de malfaiteurs* laws developed in several civil-law countries. This model is inspired by articles 416 and 416bis of the Italian Penal Code, which were introduced in 1982 to criminalize the role of members in an organized criminal group.[8] In contrast to the conspiracy offence under subparagraph (i) of article 5, paragraph 1 (a), the offence under subparagraph (ii) adopts a model that makes the participation in an organized criminal group a separate offence. In essence, subparagraph (ii) attaches criminal liability to intentional contributions to organized criminal groups, not to the pursuit of a preconceived plan or agreement.

31. The offence in article 5, paragraph 1 (a)(ii), is based primarily on the participation of the accused in the activities of an organized criminal group, not on any agreement between members of the organization.

32. The physical elements of article 5, paragraph 1 (a)(ii), require that the accused have been "taking an active part in" either (a) the criminal activities of the organized criminal group; or (b) other activities of that group.

33. The mental elements of article 5, paragraph 1 (a)(ii), require that the accused had:

(a) An intention to take an active part (article 5, paragraph 1, chapeau); and

(b) Knowledge of either:

(i) The aim and general criminal activity of the organized criminal group; or

(ii) The intention of the organized criminal group to commit crimes.

34. If the participation relates to other, non-criminal activities of the organized criminal group, article 5, paragraph 1 (a)(ii)(b), further requires proof of knowledge that such participation will contribute to achieving the criminal aim.

35. According to article 5, paragraph 2, the intention and knowledge required under article 5, paragraph 1 (a)(ii), may be inferred from objective factual circumstances.

[8] A further influence in the development of article 5, paragraph 1 (a)(ii), can be found in the moves within the European Union in the late 1990s to agree on a framework for greater harmonization of laws to counter organized crime. In 1998, a joint action on making it a criminal offence to participate in an organized criminal group in Member States of the European Union (98/733/JHA) was issued. This document is widely considered to have provided the first internationally agreed upon definition of a criminal organization. The joint action also provided a codification of the offence of participation in a criminal organization.

Table III
Elements of article 5, paragraph 1 (a)(ii)

Type of element	*Element*
Physical/material elements (actus reus)	Taking an active part in: (a) The criminal activities of an organized criminal group, or (b) Other activities of that group
Mental/fault elements (mens rea)	Intention to take an active part Knowledge of: (a) The aim and general criminal activity of the organized criminal group, or (b) The intention of the organized criminal group to commit crimes If the participation relates to other, non-criminal activities of the organized criminal group: Knowledge that such participation will contribute to achieving the criminal aim

36. Liability under article 5, paragraph 1 (a)(ii), requires that an accused "takes an active part in" certain activities of an organized criminal group (as defined in article 2, paragraph (a)). This renders the participation "distinct from [criminal offences] involving the attempt or completion of the criminal activity", as required by article 5, paragraph 1 (a). The participation of the accused may be (a) in the group's criminal activities, or (b) in other, non-criminal activities if the accused knows that his or her contribution will contribute to achieving a criminal aim. This may include persons who commit a criminal offence in pursuit of the aims of, or on behalf of, the organized criminal group but also persons who operate legitimate front operations in support of an organized criminal group or who provide services such as bookkeeping, knowing that such conduct contributes to the achievement of the criminal aims of the group.[9]

37. The mental elements of article 5, paragraph 1 (a)(ii), restrict liability to persons who intentionally participate in the above-mentioned activities and who have positive knowledge of the aims and activities or the criminal intentions of the organized criminal group. In practice, this will generally require proof that the accused became involved in the organized criminal group for the purpose of supporting its criminal objectives. This requirement also suggests that the accused must have some prior knowledge of the organized criminal group's criminal activity. On the other hand, the mental elements exclude from liability any person who may unwittingly contribute to an organized criminal group or who is recklessly indifferent about the nature and activities of the group. In accordance with article 34, paragraph 3, States parties to the Convention are, however, at liberty to lower the mens rea requirement and expand liability to recklessness, negligence or even strict liability without proof of a mental element. In the case of "recklessness", the defendant only foresaw the possibility that his or her actions might contribute to the activities of an organized criminal group. In "objective negligence", the

[9] *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, paras. 61-64.

defendant failed to exercise the necessary caution expected from other, ordinary persons.

38. The application of article 5, paragraph 1 (a)(ii), thus allows for the liability of persons who are more remotely connected to criminal activities. For liability under this offence to arise, it is not required for any criminal offences to have been planned, prepared or executed. Article 5, paragraph 1 (a)(ii), attaches criminal liability to events that occur well before the preparation (and sometimes before the planning) of specific individual offences. Subparagraph (ii) thus creates an avenue to hold low-level enhancers and facilitators of organized criminal groups criminally responsible for their contributions. Furthermore, there is no requirement to demonstrate an overt act, which, as mentioned earlier, limits the application of the conspiracy offence in some jurisdictions. Article 5, paragraph 1 (a)(ii), thus renders liable organizers and financiers of organized criminal groups who are not physically involved in the criminal activities of such a group, but who control, plan and "mastermind" its operations.

IV. Extended forms of criminal liability

A. Criminal liability for participation in the commission of a serious crime involving an organized criminal group

39. Article 5, paragraph 1 (b), of the Convention extends criminal liability to persons who provide advice or assistance with respect to the commission of serious crimes involving such a group. This specifically includes persons intentionally "organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group". Article 5, paragraph 1 (b), thus enables the prosecution of leaders, accomplices, organizers, and arrangers, as well as lower-level participants, in the commission of serious crime.

40. "Aiding, abetting, facilitating or counseling" covers secondary parties and accomplices who are not themselves principal offenders. "Organizing" and "directing", on the other hand, are extensions not commonly found (or defined) in national laws. To that end, article 5, paragraph 1 (b), is intended to ensure the liability of leaders of organized criminal groups who give orders relating to, but do not themselves engage in, the commission of the actual crimes.[10]

B. Liability of legal persons

41. Complex corporate structures can effectively hide true ownership, clients or particular transactions related to organized criminal activities. Individual executives may reside outside the country where the offence was committed, and responsibility for specific individuals may be difficult to prove. Thus, the view has been gaining ground that the only way to remove this instrument and shield of transnational organized crime is to introduce liability for legal entities.[11]

[10] Ibid., para. 66.

[11] Ibid., paras. 240-243.

42. Article 10 of the Convention serves as a tool to hold corporations (that is, legal persons) responsible for participation in serious crimes involving organized criminal groups. At the time the Convention was developed, corporate criminal liability was less widely recognized than it is today and, therefore, article 10, paragraph 2, allows States parties to choose whether the liability of legal persons is of a criminal, civil or administrative nature (or any combination thereof).

43. Measures to hold legal persons liable are designed as an additional, not an alternative, tool to the criminal liability of natural persons who have committed offences under the Convention. Article 10, paragraph 3, specifically states that the liability of legal persons "shall be without prejudice to the criminal liability of the natural persons who have committed the offences".

V. Issues and challenges

44. Since it was concluded in 2000, the Convention has found widespread support and adoption. A great number of countries have implemented the requirements under the Convention, thus closing many loopholes relating to the criminalization of organized crime. Experience has shown that the offences set out in article 5 can be adapted to a variety of legal systems and that this provision can be used as a tool to effectively prevent and combat transnational organized crime.

45. Nevertheless, the implementation of provisions based on article 5 has not been without controversy. The complexity of those offences also provides challenges to national lawmakers, who may need to adjust the international requirements to domestic settings and to comply with constitutional requirements. National legislators also need to ensure that their laws are flexible enough to capture the full spectrum of organized criminal activity, while preventing these laws from being too vague and overly broad. The following sections illustrate and reflect on some of the main issues and challenges that have emerged since the inception of the Convention and offer some examples of promising practices in addressing these points.

A. Scope

46. A common concern regarding the types of offences promulgated by article 5 of the Convention is the potential scope of the provisions that criminalize agreements to commit crime and participation in an organized criminal group. The figure following paragraph 4 above illustrates how these offences significantly extend the established spectrum of criminal liability, which in turn raises questions about where criminal liability for these offences should begin and where it should end.

1. Vagueness and overly broad nature

47. The wide scope of many offences under article 5 has been criticized for being overbroad. Many provisions and elements have been described as vague and their meaning as uncertain, given their rationale and nature. Moreover, some jurisdictions have formulated deliberately broad criminal provisions to allow for flexible application to various types of organized criminal groups and to capture different types of association. The common concern, however, has been that the breadth of the offences is so extensive and the interpretation of terms so broad that almost any

person who associates with organized criminal groups could be targeted by these laws, regardless of how close or distant their association may be.

48. The source of this concern is frequently the use of vague and wide-ranging terms to express the conduct element of the offence. For example, some jurisdictions use terms such as "participating in" and "associating with" organized criminal groups without clearly defining what constitutes "participation" and "association". As a result, the scope of the offence becomes so broad that it potentially criminalizes both persons who are intimately involved with the group and those who are only distantly connected to it. Offences that are formulated in this vague and broad manner are difficult to reconcile with the requirement of the rule of law and the principle of legality, namely that criminal law should be sufficiently clear for individuals to be able to distinguish between those acts which will infringe the norms that it lays down and those which will not. In other words, these offences are not always sufficiently precise about which conduct is criminal and which is not.

49. Clear definitions and qualifications placed on relevant elements are a simple way of avoiding criticism for being vague and overbroad and, in the medium and long term, are more likely to withstand constitutional and other judicial challenges. In this context, a promising practice adopted by some jurisdictions is the requirement of "active participation" in an organized criminal group.

50. Also important in this context are the mental elements that accompany the physical elements of the offence. The chapeau of article 5, paragraph 1, specifically states that criminal offences must be committed intentionally, and, although States parties are at liberty to lower the required threshold for the mental elements,[12] great caution should be exercised in order not to criminalize those individuals who, through their conduct, contribute to or otherwise associate with an organized criminal group unwittingly or through no fault of their own. It is for this reason that the domestic offences of most jurisdictions require proof of subjective mental elements such as intention, knowledge or recklessness (that is, acting despite foresight that harm may occur). These elements recognize the individual guilt or blameworthiness of the accused.

51. In summary, a careful combination of clearly articulated physical and mental elements serves to establish precise boundaries of criminal liability, while addressing the shortcomings of existing laws that do not capture the activities of directors, financiers and others situated at the top of the organizational structure of criminal groups.

2. Guilt by association

52. The offences under article 5 and their domestic counterparts have also come under frequent criticism for creating guilt by association and thus potentially violating the right to presumption of innocence. There is a widely held view that, if designed poorly, the offences relating to participation and membership, association and support of organized criminal groups can penalize people simply for their connection to illegal entities, thus violating basic human rights and civil liberties. In several jurisdictions, criminalization provisions relating to organized crime have been challenged before domestic courts because of potential violations of article 22.

[12] Article 34, paragraph 3.

paragraph 1, of the International Covenant on Civil and Political Rights, which states that "everyone shall have the right to freedom of association with others", and of article 14, paragraph 2, of the Covenant, which states that "everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law".[13]

53. Offences that do not adequately recognize the types and levels of involvement a person may have with an organized criminal group are most at risk of violating international and national human rights law and of being overturned by the courts. As mentioned earlier, offences that base criminal liability on mere participation and association do not articulate clear boundaries and do not conclusively answer the question of how remotely a person can be connected to an organized criminal group and still be liable for participation.

54. A promising practice that has emerged in several States parties is the differentiation between different types of participation in and association with an organized criminal group. Some jurisdictions, for instance, have a separate offence for persons who establish, direct or otherwise lead an organized criminal group. Persons who commit a criminal offence on behalf of an organized criminal group are often liable under a separate offence (sometimes referred to as the "soldier offence"), while still other separate offences are set up for those who provide material support to such a group with the knowledge of its criminal activities and objectives. These offences not only serve to avoid criticism related to "guilt by association", but also reflect the different roles and levels of seniority different persons may have in an organized criminal group.

3. Double inchoate liability

55. A further point of concern relating to offences based on article 5, paragraph 1, of the Convention pertains to the creation of criminal liability by way of attempt, incitement and conspiracy. As discussed earlier, the purpose of both models of participation set out in article 5 is to expand criminal liability to cover the planning and preparation activities of organized criminal groups and to hold liable persons who are involved in such a group without committing a criminal offence themselves. This is achieved by creating additional offences that place liability on an agreement to commit a crime or on participation in an organized criminal group.

56. A technical but very important question raised by the creation of these additional offences is whether it is also possible to attempt, incite or conspire to commit these offences. For example, is it possible — and should it be criminalized — to attempt to participate in an organized criminal group? Is it or should it be a criminal offence to try to incite another person to enter into an agreement to commit a future crime? These are essential conceptual questions that need to be explored and firmly answered at the implementation stage of the criminal provisions. Although the Convention does not provide guidance on this point, it is generally considered that it is not permissible to create so-called "double inchoate liability", that is, attempting, conspiring to commit or inciting a criminal offence that itself is a preparatory crime. Put simply, it is not considered a good practice to criminalize

[13] The Convention does not deal with prohibition of membership in specific organizations. See *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, para. 49.

"attempting an attempt" because such offences would be so far removed from any actual criminal activity, any actual harm and any potential social danger that they generally would not warrant and do not justify criminalization.

B. Elements and implementation

57. In addition to the more general, conceptual challenges described above, several concerns relating to the implementation and design of the offences set out in article 5, paragraph 1, of the Convention can be identified. These concerns are not the same for the two types of offences set out in article 5, paragraph 1 (a)(i), and article 5, paragraph 1 (a)(ii), and are explored separately in the following paragraphs.

1. Article 5, paragraph 1 (a)(i): the agreement model

58. One of the practical advantages of the conspiracy offence, and thus of article 5, paragraph 1 (a)(i), is that it offers a means of targeting the master plan of criminal activities, i.e. the agreement, rather than limiting liability to isolated substantive offences. Conspiracy recognizes the connection between different individuals and different crimes by allowing the merging of the prosecution of several charges against multiple persons.

59. The difficulty resulting from this combining of offences and offenders is the complexity of conspiracy prosecutions and trials. Proving the elements of offences based on article 5, paragraph 1 (a)(i), can be difficult for certain types of involvement in an organized criminal group. Three main challenges to successful prosecutions arise in this regard. First, the "agreement model" cannot be used to charge persons who are not part of the agreement. In practice, this may exclude from liability low-ranking members who are not privy to the agreement and are not involved in the planning of criminal activities. Even if they have some knowledge of, or are reckless about the existence of, the agreement, there can be no liability as long as they are not a party to it.

60. Second, in those jurisdictions which require proof of an overt act committed in furtherance of the agreement, as many jurisdictions do, it becomes difficult to target high-ranking members of organized criminal groups who mastermind the activities but who are not involved in executing the plans and thus do not engage in any overt acts.

61. A third problem with the "agreement model" stems from the fact that senior members of an organized criminal group may give instructions about the general type and nature of criminal activities to be carried out, but their planning and instructions may not involve specific details about individual operations. Domestic laws relating to conspiracy thus frequently struggle to capture multifaceted criminal enterprises in which the agreement between the leading figures lacks a certain level of specificity.

62. It is fair to say that, in the light of these practical and long-standing difficulties, the "agreement model" set out in article 5, paragraph 1 (a)(i), has proven to be less popular among States parties than the "participation model" under article 5, paragraph 1 (a)(ii). It is for this reason that some jurisdictions, especially

those with common-law traditions, have adopted an offence based on article 5, paragraph 1 (a)(ii), in addition to existing conspiracy provisions. In some countries, however, conspiracy remains the primary offence for capturing persons involved in organized criminal groups.

63. Some States have sought to address these difficulties by amending their existing conspiracy provisions following ratification of the Convention. This has led in some instances to the creation of offences that are so broad that they criminalize almost any kind of agreement, thus departing from the fundamental purpose of the Convention and creating criminal liability without precise boundaries.

64. The UNODC Model Legislative Provisions against Organized Crime set out a promising model for the implementation of article 5, paragraph 1 (a)(i), in domestic law which limits the scope of the offence to agreements that are made "in order to obtain, directly or indirectly, a financial or other material benefit".[14]

2. Article 5, paragraph 1 (a)(ii): the participation model

65. Some of the difficulties in designing and implementing the offence under article 5, paragraph 1 (a)(ii), of the Convention relate to the element that describes the relationship between the accused and the organized criminal group. As mentioned earlier, some jurisdictions base criminal liability on loosely termed elements such as "participation" and "association", which raises concerns over the level of involvement necessary for criminal liability to arise.

66. A further question to be addressed in this context is whether liability for offences based on article 5, paragraph 1 (a)(ii), should be limited to active participation or also extend to passive participation and to participation by mere presence. While article 5, paragraph 1 (a)(ii), makes specific reference to "taking an active part", some jurisdictions have formulated their domestic offences in a much broader manner to include, for example, persons who are bystanders observing the activities of an organized criminal group and persons who provide support that is not directly linked to any criminal activity. While the use of broader terms and interpretation may allow for more flexible (and more frequent) application of relevant criminal provisions, it is debatable whether persons who, for example, watch and witness the criminal activities of an organized criminal group without either contributing to or disrupting them should be criminally liable for "participation in an organized criminal group". The general view adopted by most States parties appears to be that passive participation by persons who are not members of the organized criminal group is not sufficient to justify prosecution and punishment.

67. A promising practice found in the laws of several jurisdictions is the differentiation between types and levels of involvement in an organized criminal group. Under this format, more serious offences are reserved for persons who direct and mastermind the group's activities, while separate offences are used for those who carry out criminal offences on the group's behalf and for those who support the criminal activities in other ways. An additional practice is to limit liability for participation to members of organized criminal groups, so that persons more remotely connected to the group will not be held criminally liable.

[14] Model Legislative Provisions against Organized Crime (United Nations, New York, 2012).

68. A related issue is the threshold established by the mental element of the participation offence. As mentioned earlier, many jurisdictions adopt the standard set in the chapeau of article 5, paragraph 1, so that the participation has to be intentional and with knowledge of the nature of the participation. This limits liability to intentional contributions to organized criminal groups and excludes persons who may have contributed to the group unwittingly. States parties differ in their inclusion of recklessness or other forms of indirect intention. This makes it possible to hold criminally liable people who have some awareness that their participation could or might contribute to the criminal activities of the group but who do not have certainty or actual knowledge about these consequences. The purpose of lowering the mental element in this way is to deter potential offenders and send the message of "when in doubt, stay away".

3. Aggravations

69. In addition to the basic participation offence, several States parties have introduced separate provisions to capture other types of involvement in an organized criminal group. Frequently, these offences are aggravations to the participation offence and provide higher penalties for persons who are more intimately involved with the organized criminal group or who occupy a senior role and are thus seen as more blameworthy than "ordinary" participants.

70. The most significant aggravation found in many jurisdictions is a separate offence for directors and leaders of organized criminal groups. These offences may also be seen as a reflection of article 5, paragraph 1 (b), which mandates the criminalization of "organizing" or "directing" the commission of serious crime involving an organized criminal group. These aggravations have important practical and symbolic meaning in that they provide specific offences and/or higher penalties for senior members and others occupying key functions in the organized criminal group.

71. A promising practice emerging in some jurisdictions is the implementation of other aggravations that criminalize specific types of involvement in an organized criminal group, such as financing the criminal activities and recruiting new members. It is also common for domestic law to combine existing offences with an element relating to the involvement of an organized criminal group, so that offences such as robberies, trafficking in persons or supplying illicit drugs are aggravated if they are carried out by such a group.

C. Scope and application

72. A final issue that has sparked particular controversy regarding the scope and application of article 5 of the Convention and domestic laws to counter organized crime stems from the way in which "organized criminal group" and similar terms have been defined, interpreted and applied. Although article 2, paragraph (a), of the Convention has established a universally accepted definition of the term, debate and uncertainty about the scope and application of the term continues.

73. Much of the discussion centres on the question of to what extent, if any, groups involved in political activism, protests or terrorist activities can be regarded as "organized criminal groups", so that the offences and other measures set out in

the Convention and its domestic equivalents can be utilized to criminalize and combat these types of associations. This question is of great practical significance, especially in jurisdictions that have charged or have sought to charge different types of associations, as well as terrorist organizations, with offences designed to criminalize participation in an organized criminal group.

74. The Convention itself and the extensive material interpreting the Convention and assisting States parties in their implementation efforts provide guidance on this point. Importantly, the purpose element of the definition of "organized criminal group" in article 2, paragraph (a), of the Convention establishes a firm connection to the "financial or other material benefit" as the main motivation of these groups. This, in turn, means that groups with purely political or social motives, and crimes that are not economically motivated, such as environmentally or politically motivated offences, fall outside the scope of the definition. Similarly, the Convention has no application to groups and offences that are motivated primarily by ideology, rather than profit. The Convention should not be used as a pretext to eliminate political rivals, criminalize protest and advocacy or outlaw social groups. It may, however, apply to crimes covered by the Convention and committed by those groups in order to obtain financial or material benefits.[15]

75. A further issue that has arisen in some jurisdictions stems from the practice that the finding by one court that an organization is an organized criminal group is then adopted without further investigation in later, separate trials. This may lead to the continued labelling of certain groups and a perception that "once an organized criminal group, always a criminal group". While the rules of precedent may dictate that the same interpretation be adopted in future decisions, the question of whether a group of persons in a particular situation constitutes an organized criminal group should be made on a case-by-case basis, depending on the specific circumstances.

VI. Conclusion

76. Offences designed to penalize involvement in organized criminal groups are an important tool to combat organized crime within and across international borders. The offences set out in article 5 of the Organized Crime Convention are part of an ambitious strategy to prevent and suppress transnational organized crime worldwide.

77. The present background paper has sought to illustrate that, while different models have been adopted by the States parties to the Convention, the common feature of these offences is that they are designed to target the structure, organization, members and associates of organized criminal groups.

78. The implementation of these offences is driven by the realization that punishing individual offenders after criminal offences have been committed does little to dismantle the organized criminal groups behind these illegal activities. In contrast, the offences set out in article 5 of the Convention are preventive. Criminalizing participation in an organized criminal group creates an avenue to pre-empt and prevent further criminal activities by the group and deter existing and

[15] *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, para. 59.

potential associates. The offences allow law enforcement agencies to intervene earlier, before a criminal group commits specific offences. The information given in the present paper seeks to assist States parties in their efforts to set up or assess their normative framework to combat organized crime.

United Nations CTOC/COP/WG.2/2014/3

Conference of the Parties to the United Nations Convention against Transnational Organized Crime

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Liability of legal persons

Liability of legal persons, article 10 of the United Nations Convention against Transnational Organized Crime

Background paper by the Secretariat

I. Introduction

1. At its meeting held in Vienna from 28 to 30 October 2013, the Working Group of Government Experts on Technical Assistance recommended, inter alia, that the United Nations Office on Drugs and Crime (UNODC) expand the knowledge base on legislative and administrative measures to combat transnational organized crime, including by preparing issue papers on provisions of the United Nations Convention against Transnational Organized Crime.[1] The present paper is prepared in furtherance of that recommendation and also integrates the responses by States to the omnibus self-assessment checklist on the Organized Crime Convention.[2]

2. The purpose of the Organized Crime Convention, as stated in its article 1, is to promote cooperation to prevent and combat transnational organized crime more effectively. The Convention seeks to encourage countries that do not yet have provisions against organized crime to adopt comprehensive countermeasures and to provide guidance for States in approaching the legislative and enforcement questions related to countering transnational organized crime. The Convention also seeks to eliminate safe havens for organized criminal groups by promoting greater

* CTOC/COP/WG.2/2014/1.

[1] United Nations, *Treaty Series*, vols. 2225, 2237, 2241 and 2326, No. 39574.

[2] In March 2013, a note verbale (CU 2013/58/DTA/OCB/CSS) was circulated to all Member States, inviting them to transmit to the Secretariat the completed omnibus self-assessment checklist. By 12 May 2014, seven responses, from Bahrain, Armenia, the Russian Federation, the Republic of Korea, Lebanon, Mexico and Ukraine had been received.

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standardization and coordination of national legislative, administrative and enforcement measures in order to ensure a more efficient and effective global effort to prevent and suppress transnational organized crime.

3. Article 10 on the liability of legal persons is an important recognition of the role that legal persons may play in the commission or facilitation of transnational organized crime. According to article 10, paragraph 1, each State party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes involving an organized criminal group and for the offences established in accordance with articles 5 (Criminalization of participation in an organized criminal group), 6 (Criminalization of the laundering of proceeds of crime), 8 (Criminalization of corruption) and 23 (Criminalization of obstruction of justice). In addition, subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative (article 10, para. 2) and such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences (article 10, para. 3). According to paragraph 4 of article 10, each State party shall ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

4. Serious crime is frequently committed through or under the cover of legal entities. Complex corporate structures can effectively hide the true ownership, clients or particular transactions. The concept of legal personality may also be used to shield natural persons from liability, and complex structures may be used to conceal illegal activity. The role of legal persons in illegal activity may span the whole range of organized transnational crimes, from trafficking in persons, drugs or arms to corruption and money-laundering. Ensuring the liability of legal persons is therefore an important component in combating transnational organized crime.[3]

II. Purpose, content and scope of article 10

5. Historically, many jurisdictions did not recognize the criminal liability of legal persons. Civil law jurisdictions, in particular, typically maintained the principle of individual criminal responsibility: *societas delinquere non potest*. Although initially accepted only in common law countries, the criminal liability of legal persons is now recognized, to varying degrees, in different jurisdictions and legal systems. However, while a number of jurisdictions only maintain the principle of individual criminal responsibility and do not recognize the criminal liability of legal persons, they impose civil or administrative liability on legal persons.

6. The considerable movement by States towards recognizing the liability of legal persons has, in part, been driven by the need to comply with a number of international instruments. Relevant legislation under these instruments may therefore provide useful comparisons in implementing legislation under the Organized Crime Convention.

[3] Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, United Nations, New York, 2004, paras. 240-243.

7. There are three categories of offence for which a legal person may be held liable. The first is "serious crimes involving an organized criminal group." A "serious crime" is defined as "conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty" (art. 2(b)). The breadth of this provision is therefore limited by the requirement that an organized criminal group be "involved" in the offence.

8. An "organized criminal group" is "a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit" (art 2(a)). A "structured group" is a group "that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure" (art. 2(c)).

9. With regard to the definition of "organized criminal group", the Convention does not specify whether the reference to "persons" includes legal persons, leaving the issue to be determined by States parties. While in some jurisdictions there is a presumption that references to "person" includes a legal person, this is not universally the case. In any event, the Convention provides for minimum standards, and this raises the consideration of the importance of ensuring that legal persons are liable for various forms of participation in criminal activity.

10. The second category of offences for which a legal person is to be held liable is those offences established in accordance with the Convention, i.e. offences relating to participation in an organized criminal group (art. 5), laundering of proceeds of crime (art. 6), corruption (art. 8) and obstruction of justice (art. 23). These offences are to be established under domestic law without the need for the offence to be transnational in nature or to involve an organized criminal group, except to the extent required by article 5 (art. 34(2)).

11. The third category of offences applies to those countries which are parties to the Protocols supplementing the Convention. Although not specifically referred to under article 10, article 37, paragraph 4, states that "[a]ny protocol to this Convention shall be interpreted together with this Convention, taking into account the purpose of that protocol." Further, common article 1, paragraph 2, of the Protocols to the Convention states that, unless otherwise provided, the provisions of the Convention apply, mutatis mutandis, to the Protocols. Therefore article 10 also applies to offences required under those Protocols.

12. While some countries may establish liability of legal persons only for the specific offences required under the Convention or other international instruments, there is a strong argument in favour of addressing the liability of legal persons more broadly within their legal system. Establishing the liability of legal persons for a broader range of offences would facilitate addressing issues of liability, criminal procedure and sanctions and would also help avoid a patchwork of liability and sanctions and the need to update legal provisions as new offences are created. As similar obligations are found in various international instruments, broadening the liability for legal persons may therefore facilitate compliance by States with a range of obligations, rather than on a case-by-case basis. Further, article 34, paragraph 3, provides that States parties may adopt more strict or severe measures for combating transnational organized crime than are provided for under the Convention.

13. As outlined above, some jurisdictions do not recognize the criminal liability of legal persons. To accommodate these different approaches, under article 10, paragraph 2, the liability of legal persons may be criminal, civil or administrative subject to the legal principles of the State party. This is in contrast to natural persons, for whom liability must be criminal, under the Convention.

14. Because legal persons can only act through natural persons, the liability of legal persons is often linked to the conduct of individuals. The question arises as to whether both can be liable for the offence, and whether one can be liable without the other. Article 10, paragraph 3, specifically provides that the liability of legal persons "shall be without prejudice to the criminal liability of the natural persons who have committed the offence." The intent of this provision is to ensure that individuals do not escape criminal liability even where the legal person has been held liable for an offence; that is, the liability of legal persons should not be at the expense of individual criminal responsibility.

III. Issues and challenges in establishing liability of legal persons

15. States parties must first determine to which legal persons liability is to be attached. Although the term "legal person" is not defined in the Convention, it is broadly understood to mean an entity that is recognized by the law as having some of the rights and responsibilities of legal personality. Such entities are also known as "juristic" or "juridical" persons, and may be contrasted with individuals or "natural persons". A common example is a limited liability company which is given a legal status independent of its shareholders through the process of "incorporation". It may sue or be sued, enter into contracts and own property in its own right.

16. While corporations are the dominant form of legal persons, there are many other types of legal persons, including unincorporated associations, trusts, partnerships and trade unions. The forms of legal personality and their status vary considerably between jurisdictions, and careful consideration should be given to the range of entities that may be subject to liability. This is particularly the case where liability is being established for a range of offences, criminal or otherwise.

17. The legal persons for which liability may be established also vary considerably between jurisdictions. Particularly in common law countries, there may be general interpretation provisions which state that references to "person" include, unless the contrary intention appears, bodies corporate and/or other legal persons. In other cases, the scope of the provision is stated in the legislation itself, which may be narrow or broader. In some jurisdictions, for instance, non-profit organizations are excluded from liability.

18. An important consideration in this context is whether the State and other governmental bodies should be subject to criminal liability. Such bodies include local authorities, State-owned corporations and government agencies. It is quite common, particularly in civil law countries, for the State to be expressly excluded from criminal liability, and for local public authorities to have limited liability or to be excluded from criminal liability. It is also possible for legislation to provide for targeted liability by referring to specific government departments which are subject to liability.

19. As mentioned earlier, some jurisdictions do not recognize the criminal liability of legal persons, and article 10 allows States parties to choose the form of liability to be applied, according to their legal principles. These forms of liability are criminal, civil or administrative.

20. These different models of liability reflect different levels of condemnation and procedural protection. Criminal liability reflects the highest level of condemnation that the State can impose. Such offences are typically heard by courts or equivalent bodies, and are subject to the highest levels of procedural protection. Given the seriousness of offences under the Organized Crime Convention, criminal liability could be regarded as appropriate for offences of this nature.

21. For those countries that do not recognize the criminal liability of legal persons, civil or administrative liability can provide an effective alternative. These terms have different meanings in different countries, and are sometimes used interchangeably. "Civil liability" in this context does not relate to civil actions brought under private law. Rather, it refers to penalties imposed by courts or equivalent bodies that do not result in conviction. In some countries "civil penalties" are sometimes available as an alternative to criminal prosecution for conduct involving legal persons. In this case, liability is determined according to the civil standard, in many systems of balance of probabilities, rather than the higher criminal standard, in many systems of beyond reasonable doubt.

22. In many legal systems, administrative liability is imposed by a regulator. In other systems, also courts can impose administrative liability, such as, inter alia, pecuniary sanctions. Administrative liability is used in legal systems where a legal person cannot commit a criminal offence. Some forms of liability provide for a public method of enforcement and the imposition of sanctions, but do not result in a conviction. They may also involve aspects of both civil and criminal procedure.[4] Jurisdictions vary also in the types of offence that can be committed by a legal person. In many common law countries, for instance, there is a general presumption that bodies corporate may be liable for any offence other than those which cannot be committed by an artificial entity. Some jurisdictions specifically extend the liability of legal persons to all offences, while in others, liability is more limited, for example, to offences that violate the duties of the legal person, or enrich or were intended to enrich the legal person. An alternative approach is to list those offences for which a legal person may be liable, which allows for a more limited application of liability to legal persons. Such lists may need to be expanded as new offences are created or in order to comply with international obligations.

23. Although not specifically referred to under article 10, any model of liability may be ineffective if not supported by appropriate investigative and procedural powers.

24. First, the form of liability established for legal persons may have an impact on the relevant agencies and associated powers that are available when prosecuting these entities. It is essential that investigative authorities have the necessary powers

[4] For example, in Germany rules of criminal procedure and investigation apply to the imposition of regulatory fines. Similarly in Italy administrative liability in relation to legal persons is heard by criminal courts applying criminal procedures.

to obtain access to relevant documents held by legal entities, as such documents may often provide evidence as to the commission of the offence.

25. Second, investigative powers may come into conflict with protections that are normally afforded to suspects/defendants. It is therefore necessary to consider whether protections which are developed for the protection of natural persons, should also be available to legal persons. For example, the privilege against self-incrimination is an internationally recognized human right. In some jurisdictions, legal persons are unable to claim this right. This can have a significant impact on the prosecution of legal persons, as it enhances the ability for investigators to demand access to potentially incriminating material.

26. Third, it is necessary to ensure that the rules of trial procedure include an artificial person. For example, as many jurisdictions require the personal presence of the defendant, it may be necessary to establish a provision which enables a legal person to "appear" in the proceedings.

27. A specific procedural issue that is raised in the Organized Crime Convention is that mutual legal assistance must be made available to the "fullest extent possible" for those offences for which a legal person may be liable under article 10 (art. 18, para. 2). This indirectly touches upon the fact that the conduct of legal persons may be transnational. For example, a company incorporated in one jurisdiction may act through a subsidiary or subsidiaries incorporated in other jurisdictions. As mutual legal assistance obligations commonly require "dual criminality", this situation may introduce some complexity where some jurisdictions do not recognize criminal liability in relation to legal persons. In one recent survey of European Union member States, 32 per cent of issuing and 21 per cent of executing States experienced difficulties in relation to mutual assistance due to non-recognition of the criminal liability of legal persons.[5] It is therefore important that States parties ensure that their mutual legal assistance procedures apply equally to legal as well as natural persons.

28. An additional challenge is that of determining the "nationality" of a legal person for the purposes of asserting jurisdiction. As a legal person cannot be extradited, there is arguably a special responsibility on the home jurisdiction to prosecute a legal person within its jurisdiction. This may be particularly significant where jurisdictions will not hear proceedings without the personal "presence" of the defendant. One criterion of jurisdiction in such cases is based on the "nationality" of the legal person. Although there is no universal basis for determining nationality for these purposes, two common measures are the place of incorporation and the principal place of business.

IV. Models of liability for legal persons

29. As outlined above, one of the great challenges in imposing criminal liability on legal persons is the need to attribute responsibility to an artificial entity. Most legal systems base their criminal laws on a combination of physical actions and mental states. As a legal person can only act through individuals, it is necessary to

[5] G. Vermeulen, W. De Bondt, and C. Ryckman, Liability of Legal Persons for Offences in the EU, ICRP-Series Vol. 44 (Maklu, 2012).

develop mechanisms whereby fault can be attributed to the organization. While this can be relatively straightforward in the case of physical conduct, the attribution of mental states such as "intention" or "knowledge" is more complex. Establishing the liability of legal persons should combine the need for effective enforcement with the need to reflect organizational fault. Broadly speaking, two models of liability for legal persons have emerged: the "nominalist" or "derivative" liability and "organizational fault".

A. "Nominalist" or "derivative" liability

30. The nominalist theory of liability states that as a legal person is a legal construct that can only act through individuals, the liability of the entity is therefore dependent upon the liability of individuals. For example, a company may be held liable for a criminal offence committed by an officer or employee of the corporation. Such liability is said to be "derivative" because it links the liability of the legal person to the liability of the individual; it does not seek to find fault in the organization itself.

31. Derivative liability has the advantage of relative simplicity. It fits well within the traditional criminal law model, focusing on the acts and mental states of an individual as a proxy for the fault of the legal entity. However, if fault cannot be established against the relevant individual, then the corporation escapes liability. This is particularly problematic in large organizations where responsibility is diffuse and individual responsibility may be difficult to prove. Such models of liability do not necessarily reflect the fault of the corporation in its own right. Moreover, how broadly is the scope of derivative liability defined? The two main forms of derivative liability are "vicarious liability" and the "attribution" or "identification" model.

1. Vicarious liability

32. The simplest form of derivative liability is "vicarious liability". This is based on the principle *respondeat superior* ("let the principal answer") and renders the legal person liable for the conduct of an individual employee or agent acting within the course or scope of his or her employment/agency. There is no requirement for the employee or agent to be of a certain level of seniority or responsibility; it is sufficient that they were acting within the scope of their employment or agency. Typically, the conduct must also be in part for the benefit of the organization. That is, the organization may not be liable if the employee or agent was acting entirely in their own interest.

33. In many common law jurisdictions, the application of vicarious liability is limited to relatively minor "regulatory" offences, which ensures ease of enforcement for offences that typically do not require a mental state, and which would otherwise be difficult to enforce. While this may not universally be the case, vicarious liability forms the basis for the liability of legal persons in a number of jurisdictions.[6]

[6] In the United States, for example, vicarious liability is imposed on legal persons for federal crimes.

34. The criticism of vicarious liability in the context of serious crime is that it does not necessarily reflect any fault on the part of the organization. It may, in some cases, apply where the organization has endeavoured to stop the offence. This failure to reflect organizational fault may be addressed in other ways. For example, a due diligence defence, discussed in more detail below, allows the organization to prove that it took reasonable steps to prevent the commission of the offence. Another approach is for organizational fault to be taken into account in sentencing. That is, although the legal person is made vicariously liable, the sentence imposed may be reduced if the entity can demonstrate that it took steps to avoid commission of the offence, such as the implementation of effective compliance and ethics programmes.

2. Attribution/identification model

35. An alternative form of derivative liability is the so-called "attribution" or "identification" doctrine. This is similar to vicarious liability in that fault must be found in an individual. However, in contrast to "true" vicarious liability, it is not enough that fault can be found in an employee or agent of the legal person; that person must be of sufficient standing that they may be said to represent the entity. Within common law, this person is referred to as the "directing mind and will" of the company, and it is only the actions of such a person for whom the company will be liable. Applying an "organic" theory of liability, the legal fiction that is adopted is that the company is not vicariously liable for the conduct of another. Rather, because that person *is* the company for these purposes, it is liable in its own right. In this way, it may be said that the principle of personal responsibility is maintained for legal persons. Although this approach makes some effort to reflect organizational fault by focusing on senior employees, the difficulty is in identifying who should represent the legal person for these purposes. Obvious examples include the Board of Directors and other senior officers of a company such as the CEO, managing director, and the like. However, in modern decentralized organizations considerable authority is often vested in "middle-managers". Senior officers of the organization may be remote from the relevant conduct, making it difficult to prove that they have committed a criminal offence. Because liability is derivative, without individual liability the legal person cannot be held liable. This in turn could encourage organizations to be established in such a way as to insulate senior ma agement, and by extension the company, from liability.

36. These challenges are exacerbated by the general view, at least in common law countries, that identification does not allow for aggregation of conduct. That is, liability must be found in one individual; it is not permissible to aggregate the conduct of two or more individuals to determine corporate fault.[7]

37. Some jurisdictions have adopted a more liberal approach, with a focus on the person's actual role within the organization and the purpose of the legislation, rather than relying on formal titles. This approach is found in statutory form, for example, in the Australian federal provisions, which use the term "high managerial agent", defined as "an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body

[7] See e.g. the United Kingdom case R v. HM Coroner for East Kent; Ex parte Spooner (1987) 88 Cr App R 10.

corporate's policy". The advantage of this approach is that it potentially applies to any employee, and applies an objective test of determining whether that person may be said to represent the company. In this case, liability of the legal person is not determined by the official titles, but by the actual role of the natural person within the organization.

38. Variations on the "identification" doctrine are found in a number of jurisdictions. In France, legal persons may be liable for offences committed "on their account by their organs or representatives". Similarly, in Germany, the liability of legal persons depends upon the commission of an offence by certain defined representatives of the organization. The Netherlands adopts a more flexible approach which states that the legal person may be liable for the conduct of an individual where it is "reasonable" in the circumstances. Relevant factors include whether the person was an employee, whether the conduct was part of their ordinary business, whether the organization benefited from the conduct, and the relationship between the criminal conduct and the failure of the organization to take reasonable steps to prevent it.[8]

39. In some jurisdictions, there is a mix of identification and vicarious liability. For example, the corporate entity may be criminally liable both where an offence has been committed for or on its behalf and for its benefit by its legal representatives (identification). In addition, it may also be liable if the offence has been committed for or on its behalf by an employee or agent (vicarious liability).

40. Another model of imputing liability for the conduct of senior personnel is to impose liability where there has been a failure of supervision by those personnel, or where the natural person has acted with the consent or knowledge of the senior person. Such provisions bring in a level of organizational fault by not focusing purely on the acts of senior personnel, but on their failure to supervise and prevent offences.

B. Organizational fault

41. In contrast to nominalist models, "realist" or "organizational" models of liability seek to reflect the culpability of the organization itself, without necessarily needing to focus on individual perpetrators. In this way, the "fault" of the organization may be found in the way in which it is structured, its policies and its failure to supervise its employees or agents. Such models may be combined with other models in order to provide a comprehensive approach to liability.

42. Although some models of liability expressly adopt the organizational fault approach, similar factors regarding the way the fault of the organization can be found, may be taken into consideration in other ways. For example, they might be relevant to the mental element of an offence, such as whether the organization acted recklessly, negligently or may be relevant to a defence of due diligence. They may also be relevant to the decision to prosecute or on sentencing.

[8] Supreme Court of the Netherlands, DSC, October 21, 2003, NJ 2006, 328 (Drijfmest).

1. Corporate culture

43. An example of organizational liability is found in Part 2.5 of Australia's Criminal Code Act 1995. This legislation was drafted as part of a broader review of criminal laws, and adopts a comprehensive approach to criminal liability of legal persons. Before considering the specific feature of "corporate culture", it is worth noting some other features of the legislation. First, the physical element of an offence is attributed to the corporation by vicarious liability. Where the offence is one requiring intention, recklessness or knowledge, then the legal person may be liable if the legal person expressly, tacitly or implicitly authorized or permitted the offence. There are a number of ways in which this can be done.

44. First, if the board of directors or a high managerial agent committed the offence, the legal person can be held liable. This is a more expansive view of the identification doctrine. Second, where the board or a high managerial agent expressly, tacitly or implicitly authorized or permitted the offence, the legal person can be held liable. This reflects a form of organizational liability based on authorization or permission, on the part of the board or in a high managerial agent. Thirdly, the truly innovative aspect of the legislation is that authorization or permission may be demonstrated by proving that:

(a) A corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance; or

(b) The body corporate failed to create and maintain a corporate culture that required compliance.

45. "Corporate culture" is defined to mean "an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place". Relevant to the issue of corporate culture is whether a high managerial agent had authorized the commission of the offence or a similar offence, or whether the natural person who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent would have authorized the commission of the offence.

46. The concept of "corporate culture" therefore places the organizational fault of the legal person at the core of questions of liability. Rather than attributing the liability of individuals to the entity, the latter is held liable by virtue of its structure and operation. Further, where negligence is a mental element of the offence, and that mental element cannot be established in an individual, the body corporate may be negligent if its "conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers)." In particular, negligence by the body corporate may be evidenced by the fact that the prohibited conduct was substantially attributable to:

(a) Inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or

(b) Failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

47. Although a sophisticated model of criminal liability of legal persons, it remains to be seen how these provisions will operate in practice. They do, however, serve to illustrate the potential to impose liability based on organizational fault. This

is also reflected in other jurisdictions where the fault of the legal person is based on the manner in which the entity is managed or organized.

2. Failure to act

48. Although a legal person cannot act other than through individuals, it may be argued that it can fail to act in its own right. That is, where a legal person is under a legal obligation to act, its failure to discharge that obligation can be established without finding fault in an individual.[9]

49. In the context of the Organized Crime Convention, this model of liability could be relevant where an obligation is imposed on a legal person. For example, under article 11, paragraph 3, of the Protocol against the Smuggling of Migrants, States parties should establish "the obligation of commercial carriers [...] to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State." This is an example where the failure of the company to discharge this obligation could be determined without reference to an individual person.

50. Such provisions may impose liability simply for a failure to supervise, or they may impose an additional mental element such as intention or gross negligence. Although intention may have to be established through attribution, gross negligence could be proved by considering those steps that the company took or did not take, and comparing them to the conduct of a reasonable corporation.

51. The focus of this paper so far has been on attributing liability to legal persons based on the conduct of natural persons. However, in many cases, legal persons will act through subsidiaries or other related entities. It may therefore be necessary to consider whether one organization may be held liable for their role in the offence of other organizations. For example, the parent company may be held liable for bribery by a subsidiary incorporated in another jurisdiction.

52. In some cases, it may be possible to impose liability on the parent company for being an accessory to the offence, or for conspiring to commit the offence or being part of a criminal association. However, this may be very difficult to prove and an alternative is to impose liability in relation to control of the other entity. That is, where a legal person can be shown to exercise control over another entity, the parent is held liable for the offence of the controlled entity.

V. Defences

53. As with crimes committed by natural persons, defences to liability may be available to legal persons. Of particular significance in this context is the defence of "due diligence". Although not precisely defined, due diligence is, in essence, the opposite of negligence. That is, the defendant may reduce or escape liability if it is able to prove that it took all reasonable steps to ensure compliance with the relevant law. This defence is of particular importance in relation to legal persons as it is a

[9] For example, the Israeli Penal Law provides that "[i]f the offence was committed by way of omission, when the obligation to perform is directly imposed on the body corporate, then it is immaterial whether the offence can or cannot be related also to a certain officer of the body corporate" (art. 4, s. 23(2)(b)).

reflection of organizational fault. Whether or not a legal person endeavoured to comply with the law is reflected in the structure and policies of the organization.

54. The precise content of due diligence varies with the nature of the offence, the circumstances of the offence and the nature of the defendant. Failure to exercise due diligence may be evidenced through, for instance, inadequate corporate management, control or supervision or failure to provide adequate systems for conveying relevant information to relevant persons. The due diligence defence may also involve demonstrating that an effective compliance programme is in place within the entity.

VI. Sanctions

55. Holding legal persons liable may be of limited benefit unless it is accompanied by appropriate sanctions. Article 10, paragraph 4, of the Organized Crime Convention stipulates that there is a need for "effective, proportionate and dissuasive" criminal or non-criminal sanctions. While these are to include monetary sanctions, the article also recognizes the need for effective non-monetary sanctions, which apply regardless of the form of liability adopted.

56. One of the major chalienges for States in establishing criminal liability of legal persons relates to the traditional role of criminal law in imposing "moral" sanctions on offenders. While also concerned with rehabilitation and deterrence, the stigma associated with a criminal conviction is an important feature and justification for imposing criminal liability. Nevertheless, although civil or administrative liability may lack the stigma of a criminal conviction, they may nonetheless produce effective organizational sanctions.

57. As a legal person exists only in law, it cannot suffer moral condemnation or "feel shame". However, this does not mean that effective organizational sanctions cannot be imposed. Appropriate sanctions may deter future offences by the defendant organization ("specific deterrence") and may also deter similar entities from offending ("general deterrence"). More broadly, sanctions may bring about organizational change, and in this way a legal person can be said to have been "rehabilitated".

58. What is "effective" is obviously dependent upon the organization and the circumstances of the offence. Under article 11, paragraph 1, of the Convention, sanctions must also reflect the gravity of the offence. Although this in part relates to the seriousness of the offence itself, it may also reflect the fault of the organization. For example, if the organization has been shown to have acted intentionally, or with criminal negligence, then the sanction imposed may be increased to reflect this.

59. It is important that the legal process of a State be capable of addressing sentencing factors as they apply to organizations.[10] Historically, less attention was paid to the issue of organizational sanctions in many jurisdictions, as the focus typically centred on monetary penalties. Currently, there are a number of examples of innovative sanctions that can be applied to legal persons, found in both national

[10] The United States Sentencing Guidelines, for example, adopt a comprehensive approach to sentencing factors for organizational defendants.

legislation as well as international instruments. Ideally, sanctions against legal persons should be placed in general penal legislation rather than attached to specific offences, as this helps to ensure that the full range of sanctions is available against an organizational defendant.[11] Specific categories of organizational sanctions include:

(a) Monetary penalties;

(b) Forfeiture;

(c) Adverse publicity orders;

(d) Probation;

(e) Disqualification;

(f) Deregistration.

A. Monetary penalties

60. The imposition of a monetary penalty is the most common form of sanction against legal persons. Because the latter are typically used to generate wealth, targeting the financial motive may provide an effective deterrent both for the offending organization and for those who profit from it. Monetary penalties are relatively easy to administer, and return money to the government. They are also readily adapted to differing forms of liability, whether criminal, civil or administrative.[12] The level of fine to be imposed may be set specifically for legal persons or as a multiple of that which is applicable to a natural person. For those offences that are punishable only by imprisonment, it may be necessary to provide a method of converting a term of imprisonment to an equivalent fine.

61. Although in many cases monetary penalties may have the desired deterrent effect, they may also be seen as just a business cost without necessarily bringing about organizational change. On the other hand, the impact of a monetary penalty may also be felt by "innocent" third parties such as employees, shareholders and consumers. The challenge is, therefore, to set the appropriate level of penalty. If the monetary penalty is too low, it may have little impact on the organization and not act as a deterrent to others. If it is too high, the indirect impacts may be too great.

62. One way in which this issue may be addressed is for the fine to be calculated according to the harm caused, the benefit obtained and/or the revenue of the organization. Some jurisdictions, such as Italy, adopt a two-phase process. In the first phase, the court determines the number of "quotas" to be applied, which reflects the gravity of the offence. The second phase involves a determination of the value of those shares, which is based on the company's capacity to pay.

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[11] See also the *Model Legislative Provisions against Organized Crime*, United Nations, New York, 2012.

[12] For example, under s. 30(2) of the German Regulatory Offences Act, differing penalties apply depending on whether the underlying offence was a criminal or a regulatory offence.

B. Forfeiture

63. Although not strictly a sanction, the ability to order the forfeiture of gains incurred as a result of criminal activity can be an important component of an effective justice response. This may be done generally, by ensuring that legal persons fall within proceeds of crime legislation. In addition, a number of jurisdictions make provision for a legal person to be required to return illegally obtained profits, which leads to very substantial penalties.[13]

C. Adverse publicity orders

64. For some legal persons, their reputation and "brand" is of considerable value, a number of jurisdictions rely on the option of advertising the legal person's offence. Adverse publicity orders should be distinguished from corrective advertising, where a defendant is required to publish a corrective statement. To draw the attention to the offending organization may have a significant impact as such targeted advertising may also have an educative effect, making legal persons, their stakeholders and the community aware of the illegality of the relevant conduct. The secondary impact on the personal reputation of senior officers of the organization may also encourage organizational change. Adverse publicity may also help consumers and others to consider whether to deal with the offending organization.

D. Probation

65. A commonly utilized sanction aimed at encouraging or compelling individual offenders to alter their behaviour and to avoid the commission of future offences is to subject that person to a period of court-ordered supervision or "probation". The same principle can be applied to legal persons, with "probation" used here in a general sense to describe penalties which involve the offender agreeing to comply with certain undertakings and being subject to a period of supervision. If the legal person breaches the conditions imposed, it may be brought back for resentencing.

66. In addition to the minimum requirement not to reoffend, probation conditions may be rehabilitative or remedial. Remedial conditions are aimed at repairing any harm caused by the commission of the offence. This may be particularly significant where the legal person has the resources and/or expertise to remedy particular harms. However, some conditions require the legal person to undertake work that is not related to the offence itself. While this may be a legitimate sanction, it must be remembered that, for a legal person, such conditions may simply be operating costs to be borne.

67. Another condition is rehabilitative, that is, requiring steps to be taken in order to ensure organizational change. These should generally be subject to the supervision of the court or regulator, and can represent an onerous intrusion into the operations of the organization. Nonetheless, they are potentially a powerful mechanism for achieving organizational change.

[13] For example, in 2007 Siemens AG was penalized a total of €201,000,000 for corrupt payments, consisting of a €1,000,000 fine and €200,000,000 in disgorgement of profits.

E. Disqualification

68. A legal person that has committed an offence can be disqualified or restrained from engaging in certain activities. Such sanctions are found in a number of jurisdictions and take a variety of forms, including:

(a) Disqualification or suspension of licences;

(b) Temporary or permanent suspension of activities or closure of premises;

(c) Suspension or termination of funding or being excluded from government contracts.

69. Although potentially a powerful deterrent sanction, as with other financial penalties, they may have significant secondary effects.

F. Dissolution

70. As a legal person is a creation of the law, it can also be dissolved by law. In some cases, the nature of the offence and the organization may be such that the legal person is dissolved, which would be the equivalent of capital punishment. While this may be appropriate for organizations that have no legitimate purpose, or small companies where the secondary impacts are minimal, in the case of legitimate organizations, the secondary impacts may be regarded as unacceptably high.

71. Dissolution may be brought about indirectly, for example, by imposing a fine that is so high that the company becomes insolvent. However, a number of jurisdictions specifically provide for an order that the organization be wound up or cease to engage in any further business activities.

72. In many jurisdictions, the nature of legal personality is such that dissolution may give rise to the problem of the "phoenix company"; that is, the same individuals form a new corporate entity which is able to continue business. It may therefore be necessary to consider related sanctions on individuals, such as disqualification of directors from being involved in future companies.

VII. Conclusion

73. Article 10 on the liability of legal persons is an important recognition of the role that legal persons may play in the commission or facilitation of transnational organized crime. Legal persons may facilitate the crimes of natural persons as well as committing offences in their own right. In order for legal persons to be made accountable for their involvement in transnational organized crime, States parties must ensure that appropriate models of liability are in place, supported by effective and proportionate sanctions.

74. Although the liability of legal persons for criminal conduct may be a relatively new concept, it is well-established in many jurisdictions. It is also required by a number of international instruments in addition to the Organized Crime Convention.

75. This background paper has sought to illustrate the challenges that arise in imposing liability on legal persons. It has discussed a number of responses, from a

variety of legal systems, that may be applied or adapted by States. Regardless of the form of liability adopted, there are a range of sanctions that may be imposed to ensure the effective accountability of legal persons. If supported by appropriate rules of investigation and procedure, the liability of legal persons can then be an important component of global efforts to combat transnational organized crime.